

Contemporary Challenges to Executive Power: The Constitutional Scheme and Practice in India

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The Constitution of India that is modeled on the Government of India Act, 1935, deviates from the British Parliamentary form of Government. The framers of the Constitution also were decisive in having the parliamentary form of government, yet no mention of the form of government was made in the Constitution. The desire of a few to have the parliamentary form of government and the adoption of the constitution without any detail to ensure that form of government has created a constitutional conundrum in the working of the Constitution of India. Coupled with this, the vast amount of governmental functions to fulfill the aspirations of the Constitution and its people, the nature and extent of executive power as organized under the Indian Constitution have been organized wide enough to cover every aspect of human life. Unless the vast expanse of this executive power is controlled and regulated, the misuse and abuse of power will certainly continue to increase in the absence of any meaningful accountability either in practice or under the Constitution.

Unlike the American and the British Constitutions, the executive power of the Union is vested specifically with the President under Article 53 and the executive power of the State is vested with the Governor under Article 154. Apart from vesting the executive power, these two provisions also provide for the exercise of such executive power either by him directly or through the officers subordinate to him in accordance with the Constitution. However, such vesting provision, unlike the American Constitution, is not there under the Indian Constitution either for the legislature or the judiciary. At the same time, it cannot be said that such powers of the legislature and the judiciary do not exist separately under the Indian Constitution. The only difference is that to arrive at the legislative and judicial powers, one has to carefully go through different provisions of the Constitution.¹ Specific vesting clauses, like the American Constitution, cannot be found under the Indian Constitution.

However, the powers vested in the President and the Governors specifically under the Constitution, have been divested in practice by following the British constitutional conventions. Attempts made by the first President to exercise the constitutional powers vested in him became futile in the presence of a strong popular leader, the then Prime Minister, Jawaharlal Nehru. The subsequent Presidents who were elected by the largest national political party did nothing to change this pattern, except for few occasional decisions taken independently. The

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¹ Articles 241, 241A, 245, 246, 247, 248, 249, 250, 252, 253, 254, 265, 267, 271, 275, 276, 286, 302, 303, 304, 307, 309, 312, 312A, 321, 323A, 323B, 327, 328, 345, 357, 370, 371, 372 and many other provisions pave way for the legislative powers and functions of the Parliament and the State Legislatures. Similarly, Articles 32, 124, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 214, 215, 216, 217, 220, 221, 222, 223, 224, 225, 226, 227, 229 and many other provisions pave way for the exercise of judicial powers and functions under the Indian Constitution.

Governors at the states became the agents of the Union and the political party in power at the centre became all powerful. The written constitutional norms have been sacrificed in favour of unwritten constitutional conventions and that too of Great Britain. The courts in India also did not realize this distinction and allowed the British constitutional conventions to override the written provisions of the Indian Constitution.

The Supreme Court of India in an attempt to define the executive power adopted a technique that may not answer the real definition of executive power excepting stating what such a power is or relegating such executive power as something subordinated to the other two branches of the government. In the beginning the Supreme Court sought to interpret the constitutional provisions on the executive power in *Jayantilal Amritlal Shodhan v. F. N. Rana*,² and in *Sardarilal v. Union of India*,³ but overruled these decisions in *Samsher Singh v. State of Punjab*.⁴ It is in this decision that the Supreme Court adopted the 'residuary test' in defining the executive power. Accordingly, the executive power of the state is what remains after the legislative and judicial powers are separated and removed. The court went on to add that the real executive power is vested in the Prime Minister and his Council of Ministers and that the President or the Governor at the State has to act only on the advice tendered by the Council of Ministers.

The prelude to such a stand was already reflected in *R. C. Cooper v. Union of India*,⁵ in which the Supreme Court held that 'under the Constitution, the President being the constitutional Head, normally acts in all matters including the promulgation of Ordinance on the advice of the Council of Ministers...the Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of the Council of Ministers and on their satisfaction'. This was relating to the exercise of legislative power and not executive power. The court probably in an attempt to harmonise Articles 75 (3) with Article 75 (2) in *U. N. R. Rao v. Indira Gandhi*,⁶ did not approach the problem in a holistic manner. Again, reading these Articles with Article 53 (1), the court literally made the position of the President the weakest of the three branches of the government.

What is 'vested' in the President as the executive power has been 'divested' in practice as evidenced by these judicial interpretations. This position has created a 'constitutional conundrum' and till date no specific answer is found by the court to reestablish the delicate constitutional balance that is provided in the text of the Constitution itself. With the constitutional immunity provided to the President and the Governors under Article 361 of the Constitution, neither these constitutional executives could be responsible and the Council of Ministers with their majority on the floor making the 'collective responsibility' an ineffective angel. In fact, the Article 361 immunity is literally enjoyed by the Council of Ministers indirectly.

² AIR 1964 SC 648.

³ AIR 1971 SC 1547.

⁴ AIR 1974 SC 2192.

⁵ AIR 1970 SC 564.

⁶ AIR 1971 SC 1002.

This is a serious aspect and needs to be addressed at the earliest to make the constitutional separation of powers and checks and balances work effectively and meaningfully.

These decisions have resulted in combining the legislative power holders represented by the Council of Ministers (15 per cent of the strength of the House of the People) and the executive power vested in the President of India under Article 53 (1). Contrary to this fact, the Supreme Court has been holding that separation of powers is one among the basic structures or essential features of the Constitution.⁷ It is even more interesting to note that the court has also recognized the 'checks and balances'⁸ provided under the Constitution against any concentration of powers.⁹

Probably one among the best interpretations of the executive power has been provided by Justice P. B. Mukharji. According to him, 'executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of State in political philosophy and political science...Executive power is nothing short of "the whole state in action" in its manifold activities. In one sense, the legislative power and the judicial power, in order to graduate from phrase to facts, have finally to culminate in executive power to become effective'.¹⁰

This view is equally shared by one of the key members of the Constituent Assembly K. M. Munshi as well who observed that 'the President was expected to be a political force representing national unity, and as will be seen from the express provisions of the Constitution, was invested as such with authority, dignity, and residual power, so that when political parties develop inflexible attitudes, he being above party, could restrain their excesses and defend the Constitution. His principal role was to prevent a parliamentary government from becoming parliamentary anarchy, or a majority government from indulging in constitutional excesses'.¹¹

In a plethora of decisions thereafter and till now, the Supreme Court has not changed its opinion. Very recently, a constitution bench of the Supreme Court attempted to deviate from this position in ***Madhya Pradesh Special Police Establishment v. State of Madhya Pradesh***.¹²

⁷ *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296; *Asif Hameed v. State of J & K*, AIR 1989 SC 1899; *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (in which the doctrine of basic structures or essential features was clearly laid down); *Union of India v. Raghubir Singh*, AIR 1989 SC 1933; *Supreme Court Advocates on Records Association v. Union of India*, (1993) 4 SCC 640; and *P. Kannadasan v. State of Tamil Nadu*, (1996) 5 SCC 670.

⁸ Articles 146, 151, 117, 207, 211, 212, 217, 222, 247, 262 (2), 274, 280, 281, 292, 323, 324, 329, 338, 352, 353, 354, 356, 357, 358, 360, 365 and many other provisions pave way for such checks and balances among the three branches of the government under the Indian Constitution.

⁹ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Special Reference No. 1 of 1964*, AIR 1965 SC 745; and *E. T. Sunny v. C. A. S. S. Employees Association*, (2004) 8 SCC 683.

¹⁰ P. B. MUKARJI, CRITICAL STUDY OF THE INDIAN CONSTITUTION 9-10 (Bombay: Bombay University Press, 1967).

¹¹ K. M. MUNSHI, PRESIDENT UNDER THE INDIAN CONSTITUTION 26 (2nd Edition, Mumbai: Bharatiya Vidhya Bhavan, 1997).

¹² AIR 2005 SC 325.

The court held that 'in a matter of grant of sanction to prosecute, the Governor is normally required to act on aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. Similar would be the situation if the Council of Ministers disables itself or disentitles itself. A question whether a matter is or is not a matter in which the Governor is required to act in his discretion can only arise in cases where the Constitution has not expressly provided that the Governor can act in his discretion. Such a question cannot arise in respect of a matter where the Constitution expressly provides that the Governor is to act in his discretion. Article 163(2), therefore, postulates that there can be matters where the Governor can act in his discretion even though the Constitution has not expressly so provided. It is presumed that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. However, on those rare occasions where on facts the bias becomes apparent and/or the decision of Council of Ministers is shown to be irrational and based on non-consideration of relevant factor, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction'. Today, even this decision seems to have no effect as the Governors of a couple of States have either given the sanction to prosecute a minister for corruption or rejected such a sanction and the issue is being agitated before the Supreme Court again.

Some of the reasons for the failure to enforce accountability in public life in general are in the first place the inability to perceive the differences between 'power' and 'function' as provided under the Constitution. It is submitted that this situation has resulted in the combination of executive powers and functions with that of the legislative powers and functions.¹³ In the second place, where the court has interpreted Articles 74 and 163, the meaning and scope of the concept 'aid and advice' has not been even attempted to be defined by the court. The real meaning as to who can aid and advice, the problem of surmounting any unconstitutional advice and related issues have not been discussed by the courts. Literally, the court has gone by the British constitutional conventions even at the cost of ignoring many of the specific provisions of the Constitution. In the third place, the relevance of Article 78 *vis a vis* Articles 53, 74, 75 and 77 has not been addressed by the court in explaining the manner of organization of executive power.

A review of these and many other decisions on these doctrines of 'separation of powers' and 'checks and balances' would reveal that the Supreme Court has not clearly laid down the constitutional values incorporated in the text of the Constitution specifically. The court even lamented on a number of occasions of the failure to implement many of its directions by the executive to enforce environmental legislation. The recently developed Commonwealth Latimer House Principles on the Separation of Powers, in which India also played a key role, seems to make no headway either.¹⁴

¹³ Articles 53, 74, 154, 163 and 356 use both 'powers' and 'functions' to indicate two distinct aspects of constitutional scheme.

¹⁴ Latimer House Principles on Separation of Powers....

As such the contemporary problem under the Indian Constitution is not only to broadly understand the dimensions of the executive power but also properly locating it in accordance with its provisions if the Constitution has to deliver goods. So long as this fundamental constitutional conundrum is not addressed properly and effectively, the collective responsibility of the Council of Ministers under Article 75 (3) and 164 (2) will remain only a distant dream. Moreover, in the name of the political sovereign under the Constitution, collective responsibility will have the tendency to get diluted further.